Tuesday morning JULY 25, 2006

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal

principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed \$1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, "Come back here, thief!" Paul said, "I paid. Look on the counter." Clerk replied, "I've got your license number, and I'm going to call the cops." Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room to wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room.

Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. Mark attributed his forgetfulness to his medication, which is known to impair short-term memory.

Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning. He recalls that, while in the back room, he heard a running engine and felt ill before passing out.

A state statute provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing upon any perceptible grade, turning the front wheels to the curb or side of the highway."

- 1. Can Paul maintain tort claims against (a) Clerk for false imprisonment and (b) Mark for negligence? Discuss.
- 2. Is Delta Gas liable for the acts of (a) Clerk and (b) Mark? Discuss.

In an effort to "clean up Columbia County," the County Board of Supervisors recently passed an ordinance, providing as follows:

- "(1) A Review Panel is hereby established to review all sexually graphic material prior to sale by any person or entity in Columbia County.
- (2) Subject to subsection (3), no person or entity in Columbia County may sell any sexually graphic material.
- (3) A person or entity in Columbia County may sell an item of sexually graphic material if (a) the person or entity first submits the item to the Review Panel and (b) the Review Panel, in the exercise of its sole discretion, determines that the item is not pornographic.
- (4) Any person or entity in Columbia County that fails to comply with subsection (2) or (3) is guilty of a misdemeanor, and is punishable by incarceration in jail for one year or by imposition of a \$5,000 fine, or by both."

Videorama, Inc., a local video store, has brought an action claiming that the ordinance violates the First Amendment to the United States Constitution.

What arguments may Videorama, Inc. reasonably make in support of its claim, and is it likely to succeed? Discuss.

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means \$480 because of your \$20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for \$500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of \$500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was \$100, but RC billed Maria for \$500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

Thursday morning JULY 27, 2006

California Bar Examination

Answer all three questions. Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal

principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Beth, Charles, and David are the directors of Web, Inc. (Web), a corporation that is in the business of creating websites.

Adco, Inc. (Adco), a corporation that markets computer advertising, had an urgent need for a complex website that would cost thousands of dollars to create. Adco approached Web about creating the website. Adco explained that it did not have the cash to pay for the work but claimed that it was a well-established corporation and asked Web to extend credit for the work.

Beth, Charles, and David unanimously agreed to take on the work, conditioned upon a prior review of Adco's financial statements and a determination of Adco's credit- worthiness. After learning this, Adco contacted David and told him that the sooner Web could start on the website, the sooner Adco would be able to pay Web.

David was anxious to obtain Adco's business. He falsely told Beth and Charles that he had obtained and reviewed Adco's financial statements and that, based on his review, "we should proceed with the work." Beth and Charles, without further inquiry, agreed, and Web created the costly website. Adco is unable to pay Web.

Beth, Charles, and David have now learned that Adco's shareholders have regularly taken its funds for their personal use.

In an unrelated transaction, Charles received a call from his friend Sam who wanted Web to create a new game website. Charles told Sam that the new game website was such a small job that he could do it at home for less money than Web.

Charles told Sam to send the payment for the game website to Charles at his home. Sam was pleased with the work and sent the check to Charles as requested. Shortly afterwards, Beth and David learned of this transaction.

- 1. What duties to Web, if any, have been breached by Beth, Charles, and David regarding the money lost on the Adco job? Discuss.
- 2. What rights, if any, does Web have against Adco's shareholders for Adco's failure to pay for the website? Discuss.
- 3. What rights, if any, does Web have against Charles regarding the contract with Sam? Discuss.

Lawyer represents Client, who sustained serious injuries when she was hit by a truck driven by Driver. Lawyer and Client entered into a valid, written contingency fee agreement, whereby Lawyer would receive one-third of any recovery to Client related to the truck accident. Because Client was indigent, however, Lawyer orally agreed to advance Client's litigation expenses and to lend her \$1,000 monthly in living expenses that he would recoup from any eventual settlement. Lawyer did not tell Client that he had written a letter to Physician, Client's doctor, assuring Physician full payment of her medical expenses from the accident out of the recovery in the case.

Unfortunately, Driver had strong legal defenses to defeat the claim, and the case would not settle for the amount Lawyer initially forecast. Counsel for Driver finally offered \$15,000 to settle the case without conceding liability. By this time, Lawyer had advanced \$5,000 in litigation and living expenses, and Client had incurred \$5,000 in medical expenses.

Client was reluctant to accept the offer. Realizing, however, that this case could drag on indefinitely with little chance of substantial recovery, Lawyer took Client out for an expensive dinner, at which they shared two bottles of wine. Afterward Lawyer took Client to Lawyer's apartment where they engaged in consensual sexual relations.

Later that evening Lawyer persuaded Client to accept the settlement offer by agreeing to give her the net proceeds after his contingency fee and the amounts he had advanced were deducted and not to pay Physician anything.

The next week, Lawyer distributed the net proceeds to Client as agreed.

What ethical violations, if any, has Lawyer committed?

Answer according to California and ABA authorities to the extent there is any difference among them.

In 2003, Tom, a patient at Happy Home, a charitable convalescent hospital that specializes in caring for the disabled elderly, asked Lilly, his personal attendant, to help him execute his typewritten will. Tom suffered from severe tremors and had difficulty signing his name. In the presence of one other attendant, Tom directed Lilly to sign his name and to date "my will." She did so and dated the document. At Tom's request, Lilly and the other attendant, in the presence of each other, then signed their names as witnesses.

The 2003 document stated "I give \$100,000 to my niece, Nan. And, because Happy Home does such important work for the aged who are disabled, I give the residue of my estate in trust to Happy Home for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2004, Tom, believing he needed to do more for the disabled elderly, asked Lilly to type a new will and told her he would take care of executing it. She typed the will, including in it the terms Tom dictated. He then asked Lilly to send two attendants into his room to act as witnesses. After the first of the attendants arrived and was present, Tom explained the purpose of the document and then signed his name at the end of the document. The first attendant then signed her name as a witness and left the room. Immediately thereafter the second attendant came into Tom's room and quickly signed the document as a witness. Lilly was not present when Tom or the attendants signed their names. The 2004 document stated "I revoke all prior wills and I give my entire estate to Happy Home in trust for the continued care of the disabled elderly. Lilly to act as Trustee."

In 2005, Tom died, leaving an estate worth one million dollars.

At the time of Tom's death there were only two convalescent hospitals in the county where Tom lived, Happy Home and Sunnyside. A few days after Tom's death, Happy Home went out of business. Sunnyside, also a charitable convalescent hospital, provides care for disabled persons of all ages.

Sunnyside has petitioned the court to substitute Sunnyside as the beneficiary of Tom's estate.

- 1. What rights, if any, does Nan have in Tom's estate? Discuss. Answer according to California law.
- 2. How should the court rule on Sunnyside's request to substitute Sunnyside for Happy Home as the beneficiary of Tom's will? Discuss.

TUESDAY AFTERNOON JULY 25, 2006

California
Bar
Examination

Performance Test A
INSTRUCTIONS AND FILE

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORF
Instructions i
FILE
Memorandum from Craig Mora to Applicant
Office Memorandum on Drafting Persuasive Briefs
Findings of Fact and Order 5
Excerpt of Transcript of Deposition of Chester Yu
Excerpt of Transcript of Deposition of LaVon Washington

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

INSTRUCTIONS

- You will have three hours to complete this session of the examination.
 This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
- 2. The problem is set in the fictional States of Columbia and Franklin, two of the United States.
- 3. You will have two sets of materials with which to work: a File and a Library.
- 4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
- 5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
- 6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
- 7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
- 8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

BLANE, MORA & NIEBAUM, LLP Attorneys at Law

MEMORANDUM

To: Applicant

From: Craig Mora

Date: July 25, 2006

Re: SavAll Drugstores, Inc. v. Phister Pharmaceuticals Corp.

Our client, SavAll Drugstores ("SavAll"), a multi-national chain of discount retail drugstores, sued Phister Pharmaceuticals ("Phister") for Phister's longstanding anti-competitive practice of refusing to sell its popular cholesterol control drug Serapatrin to SavAll.

Phister has been stonewalling us on discovery. Most recently, we propounded a narrowly drawn request for production of documents requesting Phister to produce all e-mail messages sent and received in the last five years bearing on the subject of sales and pricing of Serapatrin. About six weeks ago we had a hearing before Discovery Commissioner Felicia Moreno on our motion to compel production of the e-mails and Phister's cross-motion for a protective order seeking either to deny production or shifting the entire cost of production to us.

As ordered in the Commissioner's *Findings of Fact and Order*, we have taken steps to develop the facts surrounding the discovery issues by deposing Phister's Chief Technology Officer, Chester Yu, and Phister has deposed SavAll's computer expert, LaVon Washington.

I want you to prepare our supplemental brief. Our position is that Phister should not be relieved of the obligation to produce the documents and that Phister should pay the costs

1

of production. I have attached a recent ruling in Columbia, *Zwerin v. United Merchant Bank*, that sets forth the currently applicable rules on production and cost-shifting concerning electronically stored data. I have also attached a later case, *Baldocchi v. Orion Films, Inc.*, which applies the *Zwerin* factors and gives you some guidance on how to *apply* the rules.

Based on Commissioner Moreno's order, Phister has stipulated that it will produce at its own expense all readily available e-mails, i.e., e-mails that Mr. Yu said in his deposition remain on the individual users' hard drives and haven't yet been transferred to storage. Therefore, this first-level category (i.e., "category one") of e-mails is no longer in dispute.

In accordance with the guidelines set forth in Commissioner Moreno's *Order*, please draft a persuasive brief in which you do the following:

- 1. Summarize in a *short* introductory statement of facts the steps we have taken since the last hearing before the Commissioner and categorize the levels of data storage identified in the depositions; and
- 2. Argue that (a) Phister's motion for protective order relieving it completely of the obligation to produce the electronically stored data should be denied and (b) that Phister should be required to produce, at its own expense, all the e-mails in the *remaining* categories.

BLANE, MORA & NIEBAUM, LLP Attorneys at Law

MEMORANDUM

To: All Associate Attorneys

From: Executive Committee

Re: Persuasive Briefs

To clarify the expectations of the firm and to provide guidance to associates, all persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), whether directed to an appellate court, trial court, arbitration panel, or administrative officer, shall conform to the following guidelines.

All briefs of these documents shall include a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts so stated support our client's position.

Following the Statement of Facts, the argument begins. The firm follows the practice of writing carefully crafted subject headings which illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, **IMPROPER**: COLUMBIA HAS PERSONAL JURISDICTION. **PROPER**: DEFENDANT'S RADIO BROADCASTS INTO COLUMBIA CONSTITUTE MINIMUM CONTACTS SUFFICIENT TO ESTABLISH PERSONAL JURISDICTION.

3

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited and addressed in the argument. Do not reserve arguments for reply or supplemental briefs.

The associate should not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

1		
2		
3	IN THE SUPERIC	OR COURT IN AND FOR THE
4	STAT	E OF COLUMBIA
5		
6		
7		
8	SAVALL DRUGSTORES, INC.,)
9)
10	Plaintiff,) Case # 413406 FM
11)
12	V.)
13) FINDINGS OF FACT AND ORDER
14)
15	PHISTER PHARMACEUTICALS COR	RP. ,)
16)
17	Defendant.)
18)
19	This matter came on for hearing	g on June 6, 2006 on a discovery motion of plai
20	SavAll Drugstores, Inc. ("SavAll") to co	ompel production of documents and a cross-mo
21	of defendant Phister Pharmaceutical C	Corp. ("Phister") for a protective order relieving
22	the obligation of producing the docume	ents or, in the alternative, requiring SavAll to pay

intiff tion it of the obligation of producing the documents or, in the alternative, requiring SavAll to pay all costs of production.

23

24

25

26

27

28

29

The underlying action is a suit brought by SavAll for injunctive relief and damages arising from the alleged violation by Phister of the Columbia Unfair and Deceptive Trade Practices Act (the "Act"). The conduct complained of is the alleged refusal of Phister to sell its popular cholesterol control drug, Serapatrin, to SavAll during the period of the five years preceding the filing of this action. SavAll alleges that Phister unlawfully attempts to control and fix retail prices in violation of the Act.

SavAll propounded the following Request for Production of Documents:

Request No. 34: Please produce, either in hard copy or in readable electronic form, all e-mail messages sent and received by Phister's Sales and Marketing Department staff to and from other members of said staff regarding Serapatrin retail prices set or recommended by Phister during the period January 1, 2001 to the present.

6 7 8

9

10

11

12

13

14

15

16

17

18 19

20

21

22

23

24

25

26

27

2829

30

1

2

3

4

5

Phister's objection is that it would be unduly burdensome for it to comply with SavAll's request for the e-mails. Its assertion of burdensomeness is based on the following facts. In the past 20 years, Phister, like most modern business entities making the transition from recording their business transactions in paper media to computerized methods, has increasingly converted its record-keeping, management reporting, and interoffice and customer communications systems to electronic media. Throughout that period, Phister has had a records retention practice of periodically purging the hard drives on the computers utilized by its employees, including the members of its Sales and Marketing staff, and preserving all data therefrom which are stored randomly in various "backup" media such as digital tapes, floppy disks, compact disks ("CDs"), and the like, in archives. The data are not segregated by type. For example, a particular backup tape or CD might contain indiscriminately stored e-mails, marketing reports, accounting records, interoffice memos, and the like. Phister claims that for it to segregate and retrieve e-mails from five years of such randomly stored data would be extremely costly and consume time and resources that Phister cannot divert from its business objectives. Additionally, over the years Phister has gone through an extensive series of modernizations of its computers and systems. As a consequence, the means of retrieving and reproducing the e-mails from storage media more than about a year old are no longer available internally. Thus, Phister asserts that either it should be relieved of the obligation to produce any e-mails except those that happen to be readily available in hard copy, i.e., in paper form, or SavAll should be required to pay all costs of retrieving and reproducing the e-mails, including the time and expense incurred by Phister personnel to review the e-mails for the purpose of redacting privileged and business-sensitive/confidential information.

SavAll responds by saying that Phister's election to store its documents in electronic media rather than paper does not alter the usual rule that the burden and cost of production must be borne by the producing party, i.e., it is no different than if Phister had used paper memos rather than e-mail. Moreover, there must necessarily be a number of e-mails on hard drives that have not yet been purged and transferred to archival storage media. Those can certainly be merely printed out and produced to SavAll. Also, the most recent archival backups must necessarily be easily retrievable by Phister's existing computer equipment and personnel.

SavAll is correct in stating that the usual presumption is that the producing party, in this case Phister, is required to bear the cost of producing the requested documents. However, Rule 26 of the Columbia Rules of Civil Procedure gives the court broad discretion to depart from that presumption in part or in whole depending on the circumstances. The widespread use of computers in the conduct of business, the indiscriminate storage in bulk form of vast amounts of information, and the repeated advances and obsolescence of the means of data storage and retrieval have presented unprecedented discovery issues and require the courts to adopt novel approaches to discovery requests that require production of stored, archived electronic data.

On the record before me, the parties have simply not presented enough information to rule on all aspects of the cross-motions. However, based on the moving papers and the arguments presented at the hearing, I can and do make the following findings of fact:

This litigation presents important public policy issues having to do with pricefixing and consumer protection.

SavAll's claim appears to have some merit – it has come into possession of about 50 pages of e-mails that tend to show efforts by Phister to manipulate prices of Serapatrin.

The disputed request for production (Request No. 34, *supra*) is sufficiently narrow and specific to overcome any objection that it is vague or overbroad. The amount of money at stake is significant. SavAll is suing for its lost profits, which it estimates to be in excess of \$120 million over the past five

1 years, to be trebled if SavAll can prove the statutory violation. 2 The effect of the court's ultimately granting or denying an injunction will affect the public interest, in that it could affect the price the public will have to pay 3 4 for this important drug. Both parties, SavAll and Phister, are large multi-national corporations with 5 substantial resources. 6 7 SavAll already has in its possession a number of printed-out e-mails that tend to bear on its allegations of wrongdoing by Phister. Although it cannot be 8 9 ascertained at this stage whether the sources SavAll seeks to discover contain a "gold mine" of information that might support SavAll's case, the 10 11 materials that SavAll has already discovered suggest that there might be other similar data embedded in Phister's stored data. 12 13 Because Phister is a drug and pharmaceuticals manufacturer, it is required by the Federal Food and Drug Administration to retain all communications 14 relating to its sales, marketing, and manufacturing functions for a period of 15 16 seven years. 17 The five-year period covered by SavAll's request is reasonable, given that the complaint alleges that to be the period of Phister's alleged misconduct toward 18 19 SavAll. 20 Phister has designated Chester Yu, Vice President and Chief Technology 21 Officer of Phister, as the "person most knowledgeable" about Phister's 22 computer systems, record retention policies, and record retrieval 23 methodologies. LaVon Washington, an independent consultant retained by SavAll, is the 24 person designated by SavAll as its "person most knowledgeable" on 25 26 discovery of electronically stored data. 27 There is no reason to depart from the presumption that Phister must bear the cost of producing all requested e-mails retrievable from as-yet unpurged hard drives that are in 28

active use. Phister has stipulated that it will do so. I will withhold all rulings on the remaining issues until the parties have developed further information as prescribed below. In Zwerin v. United Merchant Bank (Columbia Court of Appeal, 2002), the court approved an approach that appears suited as the mechanism for resolving the issues presented in this case. Accordingly, I make the following ORDER: Phister shall produce at its own expense all requested e-mails retrievable from as-yet unpurged hard drives that are in active use. 2. The parties shall develop a factual record based on *Zwerin's* analysis to the extent applicable and file supplemental briefs arguing in support of their positions. The most expedient means of developing such a record would be for the parties to take the depositions of each other's "person most knowledgeable," but I leave it to the parties to make that determination. Date: June 16, 2006 Felicia Moreno Superior Court Discovery Commissioner

EXCERPT OF TRANSCRIPT OF DEPOSITION OF CHESTER YU

2 * * *

- 3 MR. CRAIG MORA [Attorney for Plaintiff, Savall Drugstores, Inc.]: Mr. Yu, are you the
- 4 person at Phister Pharmaceuticals Corp. ("Phister") who is principally responsible for
- 5 computerized office systems?

1

- 6 **CHESTER YU**: Yes, that's right. That's been my responsibility for about the past 15 years.
- 7 **Q:** Over that period of time, to what degree has Phister utilized computers to conduct
- 8 communications internally and with customers?
- 9 **A:** Well, when I first joined the company, we had, by comparison to today, a fairly primitive
- 10 computer system, and the programs weren't very sophisticated. We've been through
- several upgrades in the equipment and programs we use. At first, the computers were only
- 12 used by specially trained people. Nowadays, almost everybody uses them, and most of
- our business is carried out by means of various computer media.
- 14 **Q:** Well, my questions will focus principally on the extent of the use of computers as the
- means of communications in Phister's executive, sales and marketing departments, and
- with customers. Did there come a time when Phister adopted an official "paperless
- 17 workplace" policy?
- 18 **A:** If by that you mean did we reach a point where we decided to forego to the extent
- 19 possible the use of hard copy that is, paper and begin using mainly electronic media
- 20 to generate, communicate, and store business information, the answer is yes. We began
- implementing such a plan about 10 years ago and, I'd say, it's been fully in place for the
- 22 past 7 years.
- 23 **Q:** Has e-mail always been a component of your computer system?
- 24 **A:** Yes, although in the early days it was pretty basic. Over the years, we've used
- 25 probably 6 or 7 different e-mail programs, changing them as improvements came on the
- 26 market. For the last year or so, we've been using the SoftPlan program because we've
- 27 found it to be the most compatible with most business uses.
- 28 **Q**: Has e-mail been the principal means of conducting written communications among your
- 29 executive, sales, and marketing staff and with your customers over the past five years?

- 1 **A:** Well, I can't say it's the *principal* method, but it is very widespread. It just depends on
- 2 the nature of what's being communicated and the nature of the transaction.
- 3 **Q:** Isn't it correct that Phister prescribes to its wholesale and retail customers the prices
- 4 at which its products, particularly Serapatrin, should be sold?
- 5 **A:** I don't know that "prescribes" is the right word. I know we "suggest" prices.
- 6 **Q:** Okay, I'll use your word. Does the company use e-mail as a medium of communicating
- 7 internally and among its customers its pricing policies and "suggestions" as to prices?
- 8 **A:** Yes, I'm sure we do.
- 9 **Q:** In any given day or week or month in the past 5 years, how many e-mails relating to
- pricing of Serapatrin are sent and received by company employees and its customers?
- 11 **A:** You know, I really have no way of knowing. There are thousands of sales, marketing,
- 12 and executive employees and customers all over the world, and the number has increased
- over the years as we've grown. I think I can safely say that in the past 5 years there are
- 14 thousands of such e-mails every month. I can't even guess at how many of them relate to
- 15 Serapatrin, but it must be in the hundreds every month. Probably very few of those would
- have anything to do with the *pricing* of Serapatrin.
- 17 **Q:** Does Phister have a policy or practice of printing out these e-mails?
- 18 **A:** No. We discourage it. However, I'm sure some people print out ones they particularly
- want to keep, but we have no way of tracking that. The whole object is to minimize the use
- 20 of paper and the expense of maintaining paper files. We can store electronic documents
- 21 at virtually no cost, whereas it costs huge amounts of money to process, file, and store
- 22 paper documents.
- 23 **Q:** Aside from retrieving these e-mails electronically, how else can we get them?
- 24 **A:** I don't really know. I guess we could canvass our sales and marketing employees to
- ask for any printed-out ones or canvass our customers for the same thing. But that would
- 26 produce questionable results.
- 27 **Q:** I agree. That would be a waste of time and money. Well, let me ask you this. In the
- 28 past 5 years, has Phister had an official record retention policy regarding electronic
- 29 documents?

- 1 A: Yes. It's been generally the same for about 10 years, and it works this way. We "back
- 2 up" all of our computer transactions and communications at the end of every business day
- 3 just in case of an emergency. Then, every 30 days, we do a "sweep" of all the hard drives
- 4 in our company-wide computer system and transfer all the data to permanent storage for
- 5 our archives.
- 6 Q: So for 30 days, all e-mails that a particular individual staff member sends and receives
- stay on the individual user's hard drive, and all you'd need to do is print them out, is that
- 8 right?
- 9 **A:** That's right, unless the individual deletes them for some reason.
- 10 **Q:** OK. Why do you do "sweep" or "purge" the hard drives every 30 days?
- 11 **A:** Two reasons. First, to guard against the possibility of a catastrophic systems failure
- such as might result from power failures, computer viruses, fires, casualty losses, and so
- 13 forth. If need be, we'd be able to reconstruct all the data. Second, to clear old data off the
- 14 system and maintain the useable computer capacity we need just to conduct our business.
- 15 **Q:** Has it ever happened that you've had to reconstruct data from your archives?
- 16 **A:** Fortunately, not on any significant scale.
- 17 **Q:** Isn't it true that one of the reasons you have to back up your systems is that the federal
- 18 Food and Drug Administration requires you to retain all communications relating to sales,
- marketing, and manufacturing functions for 7 years?
- 20 **A:** Yeah, that's right. But we don't segregate that stuff from all the other backed up data.
- We've never been called on by the FDA to retrieve such communications, so I don't know
- 22 what we'd do if we needed to.
- 23 **Q:** What mediums do you use to preserve and store the archived materials, and how far
- 24 back do you save them?
- 25 **A:** We actually still have all the archives for the past 15 years that I know of they're all
- stored in an offsite fireproof vault. It costs virtually nothing to store the disks and tapes, so
- 27 we just keep them rather than try to sort through them. As far as the actual storage
- 28 mediums are concerned, those have changed over the years along with advancements in
- 29 computer science. Of course, for 30 days, before we do our monthly "sweep" the data

- 1 remain on the individual users' computer hard drives, so that's one storage medium. In
- 2 the early days, we used ordinary recording tapes. Then we switched to compact disks,
- 3 then to offsite hard drives. It just depended on the degree of sophistication of our system
- 4 and capabilities and what business programs we were licensed to use at any given time.
- 5 **Q:** What about in the past 5 years?
- 6 **A:** I'm sure we've used some of each storage medium. For the past year, we've been
- 7 using the latest SoftPlan Office operating systems and storing our backups on offsite hard
- 8 drives. Before that let me see. I'd say that during 2004 and 2005 we used mainly
- 9 compact disks CDs and during 2002 and 2003 we used tapes.
- 10 **Q:** Let's take them one at a time. Is there a single offsite hard drive that contains all the
- backup data for 2006 and, if not, how many are there?
- 12 **A:** Oh, no. There are hundreds of them. When one fills up, we remove it and replace it
- with another and store the filled up ones.
- 14 **Q:** How about the CDs Phister used in 2004 and 2005? How many of those are there?
- 15 **A:** I'd have to say thousands they don't hold as much data as the hard drives we're now
- 16 using.
- 17 **Q:** And how many tapes that you used in 2002 and 2003 are there?
- 18 **A:** Again, I'd have to say thousands.
- 19 **Q:** Now, you've said that you've never segregated the stored data. What do you mean
- 20 by that?
- 21 **A:** I mean that any given storage device in the archives will contain an unsegregated
- 22 mass of data e-mails, letters, accounting reports, marketing and sales reports, business
- 23 plans, and any other kind of business documents you can think of randomly recorded on
- the storage medium.
- 25 **Q:** Would I be correct in assuming that there are computer programs that will allow you to
- search each of the storage mediums by document type and content and retrieve only the
- e-mails that deal with matters relating to the pricing of Serapatrin?

- 1 **A:** It would be a lot of work but *possible* to do that with the stored hard drives we've been
- 2 using in the past year, but I have serious doubts that we could do it with any of the earlier
- 3 storage mediums at least, not in-house.
- 4 **Q:** Please explain that.
- 5 **A:** Well, for the past year, all the data we've stored was initially produced on programs
- 6 that are compatible with our current e-mail system and the SoftPlan system. So, it would
- 7 be *possible* to run and sort the data and pull out the e-mails.
- 8 **Q**: Why do you put the emphasis on the word *possible*?
- 9 A: Because it would be a tremendous amount of work and extremely expensive. We don't
- 10 have the spare personnel it would require, and if we assigned existing staff to do it we
- wouldn't be able to get our normal work done. We'd have to hire extra people. Also, it
- would tie up computer capacity that we need for everyday business matters.
- 13 **Q:** Have you tried to figure out what it would cost to do this?
- 14 **A:** Yes. It's hard to estimate it with any certainty, but just to retrieve the e-mail data you
- want from the hundreds of hard drives we have, assuming everything went smoothly, would
- take about 1500 employee-hours. At an average of \$25 an hour, which is about what
- 17 qualified people would have to be paid, that would be \$37,500. Then, we'd have to print
- 18 them out or transfer them to CDs, have someone read them all to make sure they're
- 19 responsive to your request and sort out any confidential or privileged data maybe another
- \$15,000, for a total of just over \$50,000. I suppose we could get a better idea of time and
- 21 cost if we ran a sample with a few hard drives and extrapolated from there.
- 22 **Q:** OK. Couldn't you do the same thing with the CDs and tapes from the earlier years?
- 23 **A:** Probably not. The farther back in time we go, the less likely it is that we have the
- capability of even being able to read the data. What I mean by that is that we've changed
- 25 the computer equipment and the software programs that were in use when the data were
- initially recorded. We'd have to reacquire the equipment and programs if that's even
- 27 possible anymore to be able to read and retrieve the data.
- 28 **Q:** Have you made any estimate of what that would cost?

1 A: That's really hard to do. As to the CDs we used in 2004 and 2005, the equipment and 2 software programs are probably still available on the market. I suppose we could lease the 3 equipment and renew our licenses to the software programs. The rough cost of that would 4 be about \$25,000 a month, and it would probably take about 6 months -- \$150,000, plus about \$50,000 in additional personnel costs to do the work. So, for those CDs, a total of 5 6 about \$200,000. I suppose we could outsource it and have an outside specialist do the work, but, even at that, we'd have to supervise and review the production of the materials, 7 probably at a total cost of \$150,000 to \$175,000. It's cheaper than doing it in-house, but 8 9 we have to worry about losing control of the process and the danger of disclosing 10 confidential business information. That's a major concern of ours, so I don't think we'd be 11 willing to just turn the materials over without subjecting them to a careful review before we 12 produce them to SavAll.

13 **Q:** What about the tapes from the earlier years?

14 **A:** That would be just about impossible for us to do because I don't think we could 15 replicate the equipment and programs necessary to read and retrieve the data. We'd have 16 to outsource that to outside contractors who specialize in such work. I've gotten a very 17 rough estimate from an outside contractor – he gave me the figure of \$250,000 to read, sort, and reproduce the relevant information.

So, adding it all up, it would cost somewhere in the neighborhood of \$500,000 to do what you're asking us to do. And, what makes that hard to swallow is that there probably isn't much to be found. I mean, Phister hasn't tried to fix prices like SavAll has accused us of doing, so you're not going to find much.

Q: Well, to defend this lawsuit, you're going to have to do exactly what we're asking you to do – go through all the data and prove that you haven't fixed prices. Isn't that right?

A: I don't think so. It's not our job to prove the negative. It's *your* job to prove it, so, as

26 far as we're concerned, we don't need to go through any of the data for Phister's benefit.

27 Although I guess it would *marginally* help Phister in defending the case if we were to search

28 the data and find that there were no responsive e-mails. But we have absolutely no current

29 business need for the data.

1	MR. MORA: No further questions.
2	END OF DEPOSITION
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	EXCERPT OF TRANSCRIPT OF DEPOSITION OF LAVON WASHINGTON
29	* * *

1 MS. LAUREN LATHROP [Attorney for Defendant Phister Pharmaceuticals Corp.]:

- 2 Mr. Washington, can you please explain the capacity in which you've been retained by
- 3 SavAll Drugstores, Inc. ("SavAll") in this lawsuit?
- 4 LAVON WASHINGTON: Yes. I am the principal owner of a consulting firm called
- 5 Innovative Computer Solutions. We specialize in retrieval and reproduction of electronically
- 6 stored data. SavAll has retained my firm to assist it in pretrial discovery in its suit against
- 7 Phister.
- 8 **Q:** Are there companies other than yours that do that kind of work?
- 9 **A:** Oh, yes. We have lots of competition.
- 10 **Q:** You were present during the deposition of Chester Yu, Phister's Chief Technology
- Officer, weren't you, and you have read the transcript of his deposition, haven't you?
- 12 **A:** Yes.
- 13 **Q:** Do you understand Mr. Yu's testimony to the effect that Phister has experienced
- 14 successive changes in the computer equipment, software programs, and data storage
- mediums it has utilized over the years?
- 16 **A:** Yes. What he said is fairly typical of the transitions the business community has gone
- 17 through in recent years. Computer science has changed at an accelerated pace, and it's
- 18 likely to continue.
- 19 **Q:** You agree, don't you, that the task of identifying and reproducing for the past 5 years
- 20 the e-mails that SavAll has requested is virtually impossible?
- 21 **A:** No, not at all. It won't be easy, but it is certainly technologically possible. That's what
- 22 my company does. We do it all the time. I agree that it gets more difficult the farther back
- in time you go. But, as to Phister's most recent data, it's relatively easy.
- 24 **Q:** What do you mean, "Phister's most recent data?"
- 25 **A:** There are two categories of recent data. First, there are the e-mails that haven't yet
- been transferred to permanent storage and are still on the active hard drives of Phister's
- 27 system. That is, the accumulated e-mails for the last 30 days since the last general
- archival back up. Those can just be downloaded and printed from existing active files just

- 1 like you'd look at your e-mails on your home personal computer. Let's call that "category
- 2 one."
- 3 The second category let's call it "category two" of recent data are the data Phister has
- 4 transferred to the offsite hard drives in the past year. Phister has all the equipment and
- 5 software necessary to read, sort, and pull out the relevant e-mails. So it's just a matter of
- 6 assigning employees to do the job just like you'd have them go through paper files.
- 7 **Q:** You agree, don't you, that even that would be time-consuming and costly and that Mr.
- 8 Yu's estimate of about \$50,000 is about right, maybe even conservative?
- 9 **A:** Well, using Mr. Yu's assumptions about the volume of materials and the employee
- 10 hours required, I believe \$37,500 for the retrieval work is a bit high, but not by much. The
- only part of it that I can't evaluate is the \$15,000 he says it would cost to review the
- 12 materials for privileged and confidential information.
- 13 **Q:** What about the materials for the earlier years?
- 14 **A:** Well, they belong in a third category "category three."
- 15 **Q:** Do you agree with Mr. Yu's estimates regarding category three?
- 16 A: He's correct about it being harder to do. Based on what I know so far, I think I could
- do the CDs for about \$75,000 and the earlier tapes for about \$100,000. I have the people
- who are trained to do it and access to the obsolete equipment and software programs.
- 19 Q: So, overall, you think the job could be done for, say, \$200,000 to \$225,000?
- 20 **A:** That's right. In fact, I think it would be cheaper for me to do it than if Phister went out
- and hired its own contractor.
- 22 **Q:** Why is that?
- 23 **A:** Because I've been working with SavAll on the problem, and I've already got a head
- 24 start. Any other contractor would have to go back to square one and incur startup costs
- 25 that I've already put behind me.
- 26 **Q**: All right. How would you handle the problem of privileged and confidential information?
- 27 I mean, if you're working for SavAll, you'd be in a conflict situation, wouldn't you?

- 1 A: I guess so, but if I were ordered by the court or there were an agreement of the parties
- 2 not to turn over the materials to SavAll until they'd been reviewed and redacted by Phister,
- 3 I'd abide by that.
- 4 **Q:** How long would it take you to complete the work?
- 5 A: Hard to say. Assuming that Phister took care of the recent data in-house and turned
- 6 over all the other archives to me, I could turn it around in about 3 months. That also
- 7 assumes that Phister did its review for privileged and confidential data promptly. It might
- 8 help to predict this more accurately if whoever did the job could do some trial runs on
- 9 limited samples of each of the different kinds of storage mediums.
- 10 **Q:** What would that accomplish?
- 11 **A:** Two things, really. First, it would give you a chance to test the equipment and software
- 12 to make sure it works. Second, it would allow Phister to extrapolate from the sample and
- 13 get an idea of the ultimate volume of e-mails that would come out of it.
- 14 **Q:** How much would that cost?
- 15 **A:** It depends on how large a sample we were instructed to run. If we took a month's
- worth of the archives for each of the types of storage mediums, I'd guess we could do the
- 17 sampling for \$25,000 to \$30,000.
- 18 **MS. LATHROP:** No further questions.
- 19 END OF DEPOSITION

20

TUESDAY AFTERNOON JULY 25, 2006

California
Bar
Examination

Performance Test A LIBRARY

SAVALL DRUGSTORES, INC. v. PHISTER PHARMACEUTICALS CORP.

LIBRARY

Zwerin v. United Merchant Bank (Columbia Court of Appeal, 2002)	1
Baldocchi v. Orion Films, Inc. (Superior Court of Columbia, 2004)	8

Zwerin v. United Merchant BankColumbia Court of Appeal (2002)

We accept this interlocutory appeal from a discovery Order issued by Commissioner Marrit Schein, and we endorse what we believe is a good model for resolving the increasingly common pretrial discovery disputes involving the burdens of retrieving and producing electronically stored data.

Laura Zwerin is suing United Merchant Bank ("UMB") for gender discrimination, harassment over a protracted period of time, and retaliation under the Columbia Civil Rights Act. Her case has *prima facie* merit, and, if she prevails, her damages may be substantial. She has come into possession of a number of e-mails that tend to show she was terminated from her position as Senior Vice President/Asian Equities Sales Department because she filed a complaint of gender discrimination. She contends that additional key evidence is located in various e-mails exchanged among UMB employees and that those e-mails now exist only in backup tapes and other archived media. Zwerin moved to compel UMB to produce all such e-mails at its own expense. UMB objected, asserting that compliance with Zwerin's motion would cost approximately \$175,000, exclusive of attorney time, and moved for a protective order.

In June 2002, Zwerin served upon UMB a document request demanding that UMB produce "all documents, including without limitation electronic or computerized compilations, concerning any communications by or between UMB employees relating to Plaintiff." UMB produced about 100 pages of printed e-mails and refused to search for or produce any others on the ground that it would be unduly burdensome for it to have to resort to electronically stored archival data. Zwerin deposed Alan Benny, who, as UMB's expert, testified as to UMB's e-mail backup protocols and the cost of restoring and retrieving the relevant data.

In the first instance, the parties agreed that e-mail was an important means of communication at UMB during the relevant time period of 1999 through 2001. Each salesperson in the Asian Equities group sent and received approximately 200 e-mails a day. Given this volume, and, because the Securities and Exchange Commission regulations required UMB to preserve such communications for three years, UMB implemented an elaborate e-mail backup and preservation system. In particular, UMB backed up its e-mails in two distinct ways: on backup tapes and on compact disks.

The Tapes: Using an automated backup program, UMB routinely backed up its *internal* e-mail traffic on tapes at various intervals, the monthly backup tapes being the ones that were preserved for three years. According to Benny's testimony, there are 94 extant backup tapes.

To restore e-mails stored on the tapes requires a lengthy and elaborate process, each tape requiring about five days to restore. It could be done faster by an outside vendor specializing in data retrieval, but the cost would be commensurately greater.

The Compact Disks: Certain e-mails to and from outside "registered traders" in Asian securities are automatically stored and archived onto a series of compact disks ("CDs"). UMB has retained all the CDs since the system was put into place in mid-1998.

These CDs are easily searchable, and a person with the proper credentials can simply log into the system, search for e-mails using key words (e.g., "Laura" or "Zwerin") and isolate and reproduce responsive e-mails.

Paralleling the federal standards, the discovery processes articulated in the Columbia Rules of Civil Procedure, particularly as applicable here, in Rule 26, are intended to allow the parties to obtain *the fullest possible knowledge of the issues and facts* before trial. Consistent with this approach, Rule 26(b)(1) provides that the parties may obtain

by discovery "any matter, not privileged, that is relevant to the claim or defense of any party" in the form of "books, documents, or other tangible things," including things preserved in electronic rather than paper form.

There is no question that Zwerin is entitled to discover the requested e-mails as long as they are relevant to her claims, which they clearly are. As noted, e-mail constituted a significant means of communication among UMB employees. UMB had admittedly not searched the 94 backup tapes it possesses. Zwerin herself came into possession, other than by discovery from UMB, of over 100 pages of e-mails, several of which bear directly on her claims. These two facts strongly suggest that there are relevant e-mails that reside on UMB's backup media.

There are, of course, limitations. Rule 26(b)(2) imposes a general limitation on the frequency or extent of discovery. This so-called "proportionality test" confers upon the court broad discretion to restrict discovery that it deems unduly burdensome, cumulative, duplicative, or outweighed by the burden or expense in light of the nature of the litigation.

The usual presumption is that the responding party must bear the expense of complying with the discovery requests. However, Rule 26(c) allows a court to grant protective orders to protect the responding party from undue burden or expense, including orders conditioning discovery on the requesting party's payment of the costs of discovery.

Any principled approach to the question whether discovery costs should be shifted to the requesting party when it comes to producing electronic evidence must respect the usual presumption that the costs must be borne by the responding party. Electronic evidence is no less discoverable than paper evidence. As large companies increasingly move to entirely paper-free environments, any approach to discovery that *routinely* departs from the usual presumption will often cripple the ability of plaintiffs to obtain the evidence. Thus, cost shifting should be considered only when electronic discovery imposes a truly undue burden or expense on the responding party.

The case at bar is a perfect illustration of the range of accessibility of electronic data. As explained, UMB maintains e-mail files in three forms: (1) active user e-mail; (2) archived e-mails on compact disks; and (3) backup data stored on tapes. UMB's active user e-mails and those stored on CDs are easily accessible. The 94 available tapes fall into the backup tape category and would require a costly and time-consuming process to search and isolate the documents for production pursuant to Zwerin's request.

Whether production of electronic documents is unduly burdensome or expensive turns primarily on whether they are maintained in an *accessible or inaccessible* format, a distinction that corresponds directly to the expense of production. In turn, the question of accessibility or inaccessibility turns largely on the media on which the data are stored.

Deciding disputes regarding the scope and cost of discovery of electronic data requires a two-step approach:

<u>First</u>, it is necessary to understand thoroughly the responding party's computer system, both with respect to the active and stored data. For data that are kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of production. A court should consider shifting *only* when electronic data are relatively inaccessible, such as in backup tapes or obsolete or other very difficult-to-search media.

<u>Second</u>, because the cost shifting analysis is so fact-intensive, it is necessary to determine what data may be found on inaccessible media. As we discuss below, we endorse any measure that will assist the court in evaluating the marginal utility, i.e., how likely it is that the expensive search will produce something worthwhile. Often, proceeding in small increments such as requiring the responding party to bear the expense of running small samples from different chronological parts of the archive will be enlightening on whether the responsive data are present and in what quantity.

The application of these steps is particularly complicated where electronic data are sought because otherwise discoverable evidence is often available only from storage media from which the data are expensive to retrieve.

To make the decision, we rely on a 7-factor test, weighing the factors as we discuss below.

The 7-Factor Test:

- 1. The extent to which the request is specifically tailored to discover relevant information;
- 2. The availability of such information from other sources;
- 3. The total cost of production, compared to the amount in controversy;
- 4. The total cost of production, compared to the resources available to each party;
- 5. The relative ability of each party to control costs and its incentive to do so;
- 6. The importance of the issues at stake in the litigation; and
- 7. The relative benefits to the parties of obtaining the information.

The Seven Factors Should Not Be Weighted Equally: Whenever a court applies a multi-factor test, there is a temptation to treat the factors as a checklist, resolving the issue in favor of which column has the most check marks. But when the ultimate question on the issue of cost shifting is whether the request for production imposes an *undue burden* on the responding party, the test cannot be applied mechanically at the risk of losing sight of its purpose.

The order in which the seven factors are listed above suggests their order of importance, i.e., they should normally be weighted in descending order. The first two, and most important factors – (1) the extent to which the request is specifically tailored to discover relevant information, and (2) the availability of such information from other sources – comprise what can be called the "marginal utility analysis." As the court observed in *McPeek v. Aschcroft*, (USDC, D. Franklin, 2001),

The more likely it is that the backup tape contains the information that is relevant to the claim or defense, the fairer it is that the responding party search at its own expense. The less likely it is, the more unjust it would be to make the responding party search at its own expense. The difference is "at the margin."

A problem with applying the "marginal utility analysis" is that, at the inception, there is usually an insufficient factual basis for knowing to what extent the information being sought exists in the electronic storage media. Some courts have made an assumption that, unless the requesting party can show that there is a "gold mine" of information to be retrieved, the marginal utility is modest, at best, and they tend for that reason to lean heavily in favor of shifting the cost to the requesting party. However, requiring the requesting party to prove a "gold mine" is contrary to the plain language of Rule 26, which permits broad discovery of *any matter* that is *relevant*. Thus, we agree with the precept of marginal utility, but we reject the "gold mine" approach.

The second group of factors, next in importance, addresses the cost issues, i.e., how expensive will the production be and who can handle the expense? These factors include: (3) the total cost of production compared to the amount in controversy; (4) the total cost of production compared to the resources available to each party; and (5) the relative ability of each party to control costs and its incentive to do so.

The third "group" – (6) the importance of the issues at stake in the litigation – stands alone, and may not often come into play. However, where it does come into play, this factor becomes weightier.

Finally, the last factor – (7) the relative benefits to the parties of obtaining the information – is the least important because it is usually a fair assumption that the response to a discovery request is for the benefit of the requesting party. But in the unusual case, where production will also provide a tangible benefit to the responding party, that fact may weigh *against* shifting the costs.

The case is remanded to the trial court, the Superior Court, for determination of the pending production request in accordance with this opinion.

Baldocchi v. Orion Films, Inc.

Superior Court of Columbia (2004)

Plaintiff, Rina Baldocchi, sued defendant, Orion Films, Inc. ("Orion") for gender discrimination under the Columbia Civil Rights Act. She prays for special and compensatory damages in the amount of \$100,000 and punitive damages in the amount of \$3,000,000.

In the course of discovery, she filed a sweeping request for production of documents covering a four-year period, including e-mail messages that exist only in electronic form on Orion's computer system and in its electronically stored archives. Orion produced a substantial volume of paper documents, which it asserts is all it has in readily producible form. Orion then moved for a protective order to relieve itself of the obligation of producing the requested electronically stored documents. The basis for Orion's motion is that the burden and expense of production far outweighs any possible benefit that Baldocchi will gain from the additional discovery. Orion further contends that, if the additional discovery is ordered, the entire cost should be shifted to plaintiff.

Orion's computerized records system consists of three levels of accessibility: first, records stored in active files on hard drives that are in daily use and have not yet been transferred to another storage medium; second, records that have recently been transferred to storage on compact disks pursuant to Orion's records retention policy under which active files are purged every 90 days and transferred to compact disks; and, third, records more than two years old that were transferred to a series of about 100 magnetic recording tapes at a time when Orion was using now obsolete computer and software systems. The second and third categories are archived solely for "disaster recovery" purposes, i.e., in the event of a catastrophic systems failure. Baldocchi successfully demonstrated that the discovery she seeks, although very broad, is generally relevant.

It is not uncommon to shift the expense of production of discovery to the requesting party, especially when the discovery involves electronically stored evidence that may be extremely expensive to retrieve and produce. Rule 26 of the Columbia Rules of Civil Procedure clearly gives the court broad discretion in this regard.

Discovery of data stored electronically poses new and different issues from those applicable to the discovery of traditional paper documents. The Columbia Court of Appeal, in *Zwerin v. United Merchant Bank* (2002), recently dealt with those problems and articulated a 7-factor test for doing so. We apply those factors to the present case in the order and relative weights prescribed by the court in *Zwerin*:

- 1. The Extent to Which the Request is Specifically Tailored to Discover Relevant Information: The less specific the requesting party's demands, the more appropriate it is to shift the cost of production to that party. Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the cost. Here, plaintiff's requests are broad and nebulous, and, if that were the sole determining factor, it would favor shifting the costs to her. However, as the *Zwerin* Court makes clear, the seven factors are to be taken as a whole and assigned relative weights in descending order.
- 2. The Availability of Such Information From Other Sources: Some cases that have denied discovery of electronic evidence or have shifted costs to the requesting party have done so because equivalent information either has already been made available or is accessible in a different format at less expense.

Factors 1 and 2 go hand in hand. They can be best applied using the concept of "marginal utility" articulated in *McPeek v. Ashcroft*, (USDC, D. Franklin, 2001), under which the inquiry is how likely it is that a computerized search of the files will produce relevant information. Here, plaintiff argues that there is a high enough probability that a

broad search of the defendant's e-mails will produce relevant information that the search should not be precluded altogether.

If the plaintiff can show that it is likely that the electronic medium contains certain targeted information and can demonstrate with reasonable certainty that the information is not otherwise readily available, then she has crossed over the margin into the realm where it is just to require the responding party to bear the expense of producing it. On the other hand, if plaintiff's showing is too broad or uncertain or the responding party can show that the information is readily available elsewhere, then plaintiff's request falls below the margin and it would be unjust to require the responding party to bear the expense.

In the instant case, there has been no showing that the electronic records plaintiff seeks from defendant are available other than by a search of defendant's hard drives and backup media. Defendant's representations that it has produced all there is to be found is speculative because defendant has not conducted a search of the electronic files. However, neither has plaintiff shown any reasonable likelihood that the information she seeks can be found on the electronic media to any extent that would make an expensive search of those media worthwhile. Part of the problem is that plaintiff's discovery requests are so broad and sweeping that it is not possible to tell whether a targeted search of the data will produce what she seeks.

In light of these conclusions, it seems just to shift to plaintiff the cost of at least the initial, preliminary searches of the storage CDs and tapes. Of course, the current, unexpurgated data that remain on Orion's active files must be produced at Orion's cost.

The next three factors address the cost issues and are to be considered together.

3. The Total Cost of Production, Compared to the Amount in Controversy: This factor deals with the relativity between the dollar value of what plaintiff is attempting to

recover and what it will cost to produce the information. There is no bright-line. If the cost is not extraordinary or out of line with what a responding litigant can expect in the ordinary course of litigation, there is no justification for departing from the presumption that the responding party must bear the cost irrespective of the relationship between the cost and the amount in controversy. However, if the amount of plaintiff's alleged damages is small and the cost of extracting and producing the information is relatively large, then it makes little economic sense to require a defendant to incur a huge expense when the ultimate economic benefit is relatively small. In the present case, we know that the plaintiff's prayer exceeds \$3,000,000, which is a substantial sum. Plaintiff projects that the total cost of production would exceed \$1,000,000, a substantial sum by any standard. Defendant's estimate is \$150,000. The magnitude of this expense in relation to the most special and compensatory damages being sought by plaintiff militates in favor of shifting the cost of production to defendant.

- 4. The Total Cost of Production, Compared to the Resources Available to Each Party: Plaintiff proceeds as an individual against an established major film studio. Although the record does not reflect the extent of each party's financial resources, we can assume that this is not a situation where two functioning, successful business entities are sparring with one another such that this factor would be a wash, or, conversely, where a wealthy plaintiff is pursuing an impoverished defendant. Here, it is safe to assume that defendant can afford whatever the cost might be better than plaintiff. Standing alone, this factor favors shifting the cost to defendant.
- 5. The Relative Ability of Each Party to Control Costs and Its Incentive to Do So: The plaintiff probably has a greater ability, i.e., being sensitive to the cost, plaintiff will be able to calibrate her discovery based on information obtained in the initial sampling (see *infra*). If she is required to pay, she will be in the best position to decide whether further searches will be justified to limit the costs of discovery of the e-mails to a much greater extent than defendant. Of course, this factor alone does not prevent later

shifting of the cost back to defendant if the results of the initial search warrant it. But, as to the initial sampling, this consideration militates slightly in favor of cost shifting.

- 6. The Importance of the Issues At Stake in the Litigation: This factor does not always come into play. In this case, the issue is a straightforward one of whether there has been gender discrimination as to plaintiff, an individual. Although, in a broader context, gender discrimination is an important public policy issue, this case proceeds in the context of well-settled law and will affect only Ms. Baldocchi's interests. It is not an action that will result, for example, in vindication of a broader public interest that would be stifled if plaintiff were prevented by cost considerations from conducting discovery that would expose a widespread wrong. Thus, in this case, this factor is not particularly weighty and tends in favor of shifting the cost to plaintiff, but in the appropriate case it could be extremely important to prevent cost shifting.
- 7. The Relative Benefits to the Parties of Obtaining the Information: If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. Under such circumstances, the guiding principle is that information that is stored, used, or transmitted in new forms (e.g., electronically) should be available through discovery with the same openness as traditional forms (e.g., paper). A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery.

Conversely, a party that happens to retain vestigial data for no current business purpose but only for retrieval in case of an emergency or simply because it has neglected to discard the data should not be put to the expense of producing it. Defendant's backup tapes clearly fall into this category. There is no evidence that defendant itself ever searches these tapes for information or even has the means of doing so. Cost shifting is therefore warranted with respect to the backup tapes. Just as

a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the cost of retrieving deleted e-mails.

Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requested party. For example, a collateral benefit could result for the responding party's business such as the creation of a computer search program that would also be useful in its regular business activities. Second, the responding party might benefit in the litigation from the review of its own records. Third, the search could create a universe of data that *either* side could use to support its case.

On balance, the relevant factors tip slightly in favor of shifting the cost to plaintiff of conducting at least a preliminary search for the e-mails in this case. The protocols to be followed will be addressed below.

Privileged and Confidential Documents: Beyond the cost of isolating and producing the required e-mails, defendant argues that the time and expense of reviewing these documents for privilege and confidentiality would be enormous. Defendant estimates that it would take over six months of work by attorneys and paralegals and the cost would be about \$75,000.

However, the sanctity of defendant's documents can be adequately preserved at little cost by enforcement of a protective order requiring that all documents produced during this litigation be used solely for purposes of the litigation and that, at the end of the case, the documents all be returned to Orion. Moreover, as suggested in the protocol discussed below, defendant's interests can be protected by making provision that the emails be for "attorneys' eyes only" during discovery and that disclosure of attorney-client documents, whether intentional or inadvertent, shall not be deemed a waiver of the privilege.

Even with such protections, however, disclosure of privileged documents cannot be compelled if defendant objects. Thus, notwithstanding the recommended precautions, if defendant still chooses to conduct a complete review of the e-mails prior to production, defendant shall do so at its own expense.

The Protocol to Be Followed: The parties shall comply with the following protocol. It is a guideline only and may be modified by agreement of the parties as they proceed through discovery.

Initially, plaintiff shall designate one or more experts who shall be responsible for isolating the defendant's e-mails and preparing them for review. The experts shall be bound by the terms of this order as well as any confidentiality order entered in the case. With the assistance and cooperation of the defendant's technical personnel, the plaintiff's experts shall then obtain a log of all hard drive and backup tapes containing e-mails. The plaintiff may choose to review a sample of hard drives and tapes in lieu of all such devices.

Plaintiff's counsel shall formulate a search procedure for identifying responsive e-mails and shall notify defendant's counsel of the procedure chosen, including any specific word searches.

A very sensible protocol that was suggested by plaintiff but rejected by defendant was that the parties mutually select a limited representative sample of the hard drives and backup tapes and that defendant, at its own expense, develop the search programs, isolate the responsive e-mails, and produce them to plaintiff. The object would have been to gauge the nature, incidence, and frequency of responsive e-mails and perhaps, by extrapolation, limit the scope of the search. Defendant refused to go along because, under the proposal, it would have had to pay the cost of the sampling. Plaintiff shall develop such sampling protocol in her suggested protocol if she believes it will be helpful. It shall be conducted at plaintiff's expense.

Once an appropriate search method has been established, it shall be implemented by plaintiff's expert. Plaintiff's counsel may then review the documents elicited by the search on an "attorney's eyes only" basis. Once plaintiff's counsel have identified the emails they consider material to the litigation, they shall print out and provide those documents to defendant's counsel in hard copy, numbered and logged for later verification. At this point, plaintiff shall return all hard drives and tapes to defendant. Plaintiff shall bear all costs associated with the production described thus far.

Defendant's counsel shall then have the opportunity to review, at defendant's expense, the documents for claims of privilege and confidentiality. Documents identified as being privileged or confidential shall be retained for attorneys' eyes only until any dispute has been resolved. No waiver of privilege or confidentiality shall result from this procedure. If defendant wishes to delete from the hard drives and tapes the documents that are ultimately determined to be confidential, defendant shall do so at its own expense and shall, also at its own expense, furnish plaintiff with copies of the hard drives and tapes so redacted.

Once the nature, incidence, and frequency of the responsive e-mails are reliably estimated, the parties shall return to this court for further direction on how to proceed and which party shall bear the cost from that point forward.

Conclusion: Defendant's motion for relief is denied, and the parties are ordered to proceed in accordance herewith.

THURSDAY AFTERNOON JULY 27, 2006

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

BREENE AND FROST

Instructions	i
FILE	
Memorandum from Lynn Dawson to Applicant 1	
Memorandum from Executive Committee to All Attorneys	2
Transcript of Initial Interview with James Breene on June 27, 2006	3
Memorandum from Ted Guth to File (Interview with Hoover)	3
Memorandum from Ted Guth to File (Evaluation of Breene's Claim)	3
Transcript of Meeting with James Breene on July 26, 2006)
Letter from Julia Frost to James Breene	2

BREENE AND FROST

INSTRUCTIONS

- You will have three hours to complete this session of the examination.
 This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
- 2. The problem is set in the fictional State of Columbia, one of the United States.
- 3. You will have two sets of materials with which to work: a File and a Library.
- 4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
- 5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
- 6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
- 7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
- 8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive Cordesville, Columbia

MEMORANDUM

To: Applicant

From: Lynn Dawson

Date: July 27, 2006

RE: Breene and Frost

Our client, Jim Breene, is a patent lawyer who works principally as a consultant to other lawyers in patent litigation. He was retained by the firm of Willing, Mayer & Frost to assist Julia Frost in presenting a patent infringement case on behalf of one of Frost's clients.

Breene and Frost entered into a fee-splitting arrangement pursuant to which, according to Breene, Breene would get 50% of whatever fee Willing, Mayer and Frost received from the litigation. The agreement is enforceable, raising no formation, Statute of Frauds, or subject matter issues.

Recently, Breene received and cashed a check for \$128,000 purportedly tendered in "full satisfaction" of Breene's share of the fees. Breene claims this is far short of the full amount to which he is entitled and seeks our advice concerning what he should do.

Please draft for my signature an opinion letter, following the format and guidelines described in the firm's memorandum on opinion letters, explaining to Breene what options are available to him and which one we recommend to him.

1

LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive Cordesville, Columbia

MEMORANDUM

To: All Attorneys

From: Executive Committee

Re: Opinion Letter Guidelines

Often the firm's attorneys must prepare an opinion letter to communicate its views to a client. An opinion letter should follow this format:

- State the facts that led to the client's need for advice.
- State your understanding of the client's goal or goals.
- Identify options the client has or the actions the client could take to achieve those goals.
- Objectively analyze each of the client's options or possible actions in light of the applicable law and the relevant facts. Be sure to identify the likely success in achieving the client's goals of pursuing each option or action.
- Although you must discuss the law, you should do so as clearly and straightforwardly as possible, in language that allows the client to follow your reasoning and the logic of your conclusions.

2

TRANSCRIPT OF INITIAL INTERVIEW WITH CLIENT JAMES BREENE ON JUNE 27, 2006

Lynn Dawson ("Dawson"): Hi Jim. I understand you are here because you need help obtaining payment in a situation where you have done the work and have yet to be paid?

James Breene ("Breene"): Yes. It is a little bit complicated.

Dawson: No surprise there. Why don't you tell me what happened and where things stand right now?

Breene: Sure. I used to be a chemist, but then I went to law school at MidCentral so I could practice patent law. I passed the patent bar about 6 years ago, and all I do and all I've ever done is patent law. I don't have much of a clue about other areas, which is why I need your help.

Dawson: I understand patent law is its own separate world.

Breene: Absolutely it is. Most of what I do is pretty technical, and I've been using my chemistry background for most of it. I'm not with any law firm or any other lawyer. I've been doing it on my own. Rather than go out and try to get clients, which I didn't know how to do, I've been getting work on basically a project basis from lawyers, primarily lawyers in firms that have clients that have patent issues. They hire me to help with the patent work. I've done most of my work for Willing, Mayer & Frost, especially Julia Frost ("Frost"). I'm here to see you because I wasn't paid properly for some of the work I did for Frost.

Dawson: Do you have written agreements with Willing, Mayer & Frost, or with Frost, concerning the terms for work?

Breene: No. It is all done orally and fairly informally. They aren't really an intellectual property firm, but some of their clients end up involved in patent matters once in a while. So one of the attorneys from the firm calls or drops by my office to see if I'm available for a particular project. I'm almost always interested in taking the job, as I can use all of the work I can get. We have an understanding that I will keep track of my hours and that they will pay me half of the amount that Willing, Mayer & Frost collects from the particular client for each

hour of work I do. So, if they are charging the client \$250 an hour for my work, I'll get \$125. They pay me when the client pays. If the client doesn't pay and they aren't successful at collecting, I don't get anything, and of course neither do they. The clients are always informed of the arrangement and must approve it. It actually has been a very good arrangement for me until this problem arose.

Dawson: What happened?

Breene: In the Spring of 2003, a longtime client of Frost's, an inventor by the name of Russell Hoover, told Frost that he wanted to pursue a patent infringement case against Hampton Company. At the time, Hoover didn't have any money. So Frost made a contingency deal with Hoover.

Dawson: I take it you ended up doing some work on Hoover's case?

Breene: Yes, and the deal was that I wouldn't get paid on an hourly basis but would get 50% of whatever Frost's firm got from Hoover.

Dawson: And none of this was put into writing?

Breene: Right. I ended up doing most of the work on that case, and Hoover knew all about me and the arrangement. But we didn't write anything down.

Dawson: Did you keep track of your hours and the tasks for the Hoover case?

Breene: Not systematically the way I did when I was being paid on an hourly basis. But I made some general notations, and I could easily piece a lot of it together with my calendar.

Dawson: What was the outcome of Hoover's case?

Breene: Well, it turned out pretty well. The case settled in the middle of the trial. Hampton Company paid Hoover \$100,000 and agreed to pay future royalties to Hoover.

Dawson: What did Frost's firm get out of it?

Breene: Frost got \$50,000 in cash and an agreement that Hoover would make quarterly payments to Frost equal to 25% of all the future royalties received by Hoover.

Dawson: Did Frost pay you anything?

Breene: Yes, I got \$25,000, which is half of what Frost got from the cash settlement.

Dawson: What about the royalties?

Breene: I got a check for \$10,000 as my share of the first quarterly royalty payment. **Dawson**: Did the Frost firm explain how they arrived at the \$10,000 figure?

Breene: Yeah. The check came with an accounting from Hoover showing the total royalties Hoover had received from Hampton Company up to that point.

Dawson: Have there been any more payments?

Breene: No, that's why I'm here. About a month after the end of the next quarter — no check! I called Frost several times before she would actually talk to me.

Dawson: What did she say?

Breene: She told me that I'd already received an amount equivalent to the hourly rate agreement we had used in other cases. But I told her that was not our deal in this case.

Dawson: What was her response?

Breene: Well, it was sort of vague. She said, "I never agreed to pay you a windfall."

Dawson: Has she ever said that your payment from the Hoover case was to be limited to the old hourly rate arrangement?

Breene: No. She just said, "You've already received all you deserve."

Dawson: Did Frost or anyone at the firm ever indicate that you had failed to do the work adequately?

Breene: Never. They were complimentary and appreciative. So was their client, Hoover. And the result seemed quite positive. And no one suggested they weren't paying me because I didn't do the work properly.

Dawson: Why do you think they aren't paying you more?

Breene: Well, Frost has had a lot of money problems, and I've heard that the firm is likely to disintegrate. So the money may have already been spent, and that might be a reason I haven't been paid.

Dawson: OK, I'd like to do some research. I'll get back in touch with you.

END OF TRANSCRIPT

LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive Cordesville, Columbia

MEMORANDUM

To: File

From: Ted Guth, Associate Attorney

Date: July 7, 2006

Re: Breene v. Frost — Phone call interview with Russell Hoover

On July 7, 2006 I interviewed Mr. Russell Hoover ("Hoover") by telephone. I introduced myself and told him I was representing James Breene ("Breene"), but did not explain exactly what the nature of the representation was. I asked if he would be willing to answer a few background questions, and he was happy to do so. He said he knew Breene and remembered him from the Hampton matter and that Breene "had been real helpful" and had done "a whole bunch of stuff and spent a lot of time on it." He said he had been fully informed by Frost that Breene had been hired to do work on the Hampton matter.

Without my leading him, he said that his recollection was that Breene was to get half of Frost's share of the royalties. He said, "That's my understanding of how it worked, anyway, and I sure didn't have any problem with it."

When asked how much Frost's percentage was, he said: "Maybe 25%? I think that is what I'm sending to Frost, but you could ask my accountant." (I took the accountant's name and number.) Hoover said the patent has been quite successful and has earned over two million dollars in royalties. I asked for Hoover's prediction of future royalties. He said, "You never know about these things, but \$6 million or \$7 million total is a conservative estimate." Hoover said he had a longtime personal and professional relationship with Frost. He said that

he thought quite highly of Breene's work on the Hampton matter, was "very satisfied with it" and would recommend Breene to others.

LAW OFFICES OF LYNN R. DAWSON

5922 Jeanette Drive Cordesville, Columbia

MEMORANDUM

To: File

From: Ted Guth, Associate Attorney

Date: July 16, 2006

Re: Breene vs. Frost — Evaluation of Breene's Claim

I have completed the preliminary evaluation of James Breene's ("Breene") situation, and my research indicates there aren't any issues that would make filing a suit a waste of time. First, I talked with Russell Hoover ("Hoover") and then researched the enforceability of the fee agreement. There is absolutely nothing illegal, impermissible, or unethical about the payment arrangements among Breene, Julia Frost ("Frost") and Hoover.

There isn't anything else from a contracts perspective that makes Breene's deal with Frost unenforceable. There is obvious consideration for the deal. While the agreement isn't in writing, no Statute of Frauds provision requires it to be in writing. The fact that there is no specific dollar amount specified at the time the deal is struck is unremarkable and could not be used as a defense — many deals involve contingent payments of speculative royalties. And Hoover confirmed that the exact amount of the payments are precisely determined by regular accountings (see memo to file July 7, 2006). There isn't any argument that Breene somehow botched the work and thus was in material breach, because Hoover was satisfied and has been paying Frost. Hoover says he's earned \$2 million in royalty payments so far. That means Frost has received \$500,000 and Breene should have received \$250,000 already. So far, Frost has

only sent Breene \$10,000 as Breene's share of royalty payments. Thus Breene is due \$240,000.

I checked around, and Breene is correct: Frost's law firm is about to break up. There are some allegations that Frost had some bad real property investments, was spending way too much time concerning those, and wasn't devoting enough time to the firm. Nothing has gone to bankruptcy, but Frost's business assets might very well be tied up for quite a while.

TRANSCRIPT OF MEETING WITH CLIENT JAMES BREENE ON JULY 26, 2006

James Breene ("Breene"): I thought I needed to tell you about an unexpected development, and although I think I'm okay about it, I wondered if I need some advice concerning what to do. My office received in the mail yesterday a check for \$128,000 from Julia Frost ("Frost"). It was accompanied by a letter that said it was payment in full. Here's the letter. (Attached to this memo.) The same language about the payment was written on the front of the check, and on the back right above the place where the check is endorsed.

Lynn Dawson ("Dawson"): You said your office received it. Have you endorsed and deposited it yet?

Breene: It was endorsed and deposited yesterday. I didn't see it or sign it myself. My secretary endorses and deposits the checks made out to my business. He does it all the time. But I have asked him to always cross out any full payment or settlement language and write, in big print, "Endorsed without consent to settlement. James Breene protests the terms, and by this protest reserves all rights and remedies." He did so with this check, both on the front and on the back, and then deposited it. I didn't find out about this until I got to the office this morning and my secretary told me about the check.

Dawson: We'll need to do some quick research to decide what to do. Let me ask you a few questions. From what we've found out, it appears that you are entitled to around \$240,000 as of now. So the \$128,000 check is only a little more than half of what you've got coming. Frost doesn't have any obvious strong defenses to your claim, although nothing is certain, and sometimes good defenses show up later. Do you want to keep the \$128,000 and give up on trying to collect the rest, including likely future royalty payments?

Breene: I thought about that on the way over here. The answer to your question is no. I understand nothing is certain and that to succeed I have to prove that Frost made me that promise about the royalties. But she made it, I did a lot of work, and I'm entitled to get my percentage.

Dawson: I understand. If it turns out the only way you can sue for the full amount is to give the \$128,000 back, how would you feel?

Breene: I don't see why I should have to do that. Frost owes me this money and quite a bit more. Besides, I'm going to use the money right now. Things have slowed down quite a bit in chemical patents, and I don't get that much work these days. Right now I'm getting some home renovation done because of a flood at my house, and I've got a kid in college. So I'm really short of cash, and I need to use that money now. It came at a good time. So my preference is to keep it, assuming it wouldn't add a lot of expense and complexity to the process of suing for the rest of it.

Dawson: Do you think Frost knew anything about your really needing money now?

Breene: You mean, did she send it over to try to get an easy, cheap settlement because I was strapped for money? No. I haven't mentioned my money situation to Frost or anyone she might hear it from. But I'm a little reluctant to just give it back for another reason. As I mentioned before, Frost has had a lot of money problems recently. I think I should keep this. It is part of what she owes me, and if their finances are all messed up it might be a long time, or never, before I collect fully on this thing. So I don't want to give up on this payment, and I shouldn't have to. She owes me this and a bunch more.

Dawson: I do have another question. You must have received quite a few checks from Frost over the time you worked for her, including the two payments for what you did for Russell Hoover. Did all of the checks say "payment in full" or something like that?

Breene: From what my secretary described, this one was different. It had the letter along with it, and the language was much more complete and directed toward this situation. And it was on the back as well as the front in big print. According to my secretary there was no way to miss it.

Dawson: Okay. For now I think that's all we need to know about this.

END OF TRANSCRIPT

WILLING, MAYER AND FROST, PC

3320 E. 14 St.

Cordesville, Columbia

July 24, 2006

James Breene

4446 Luesinger Place

Cordesville, Columbia

Re: Your Fee - Russell Hoover v. Hampton Company

Dear Mr. Breene:

I am getting tired of arguing with you about the amount of your fee in this matter. I know there is a dispute about it, and I just want to get that behind us.

Enclosed is a check for \$128,000. This check is tendered to you as PAYMENT IN FULL of your fees. Your endorsing and cashing of this check constitutes a FULL AND COMPLETE RELEASE OF ALL CLAIMS you may have against me or this firm for your fees for work done in this matter.

Sincerely,

Willing, Mayer and Frost, PC

Julia Frost

Julia Frost

THURSDAY AFTERNOON JULY 27, 2006

California
Bar
Examination

Performance Test B LIBRARY

BREENE AND FROST

LIBRARY

Selected Provisions from the Columbia Commercial Code	1
Mathers v. Vincent (Columbia Court of Appeal, 2002)	4

SELECTED PROVISIONS OF THE COLUMBIA COMMERCIAL CODE

ARTICLE 1. General Definitions and Principles of Interpretation

* * *

§ 1-207. Performance or Acceptance Under Reservation of Rights. (As Amended)

- (1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.
- (2) Subsection (1) does not apply to an accord and satisfaction.

* * *

ARTICLE 3 NEGOTIABLE INSTRUMENTS

* * *

PART 3. Enforcement of Instruments

subsections apply.

§ 3-311. Accord and Satisfaction by Use of Instrument. (New)

- (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim,(ii) the amount of the claim was unliquidated or subject to a bona fide dispute,and (iii) the claimant obtained payment of the instrument, the following
- (b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.
- (c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

- (1) The claimant, if an organization, proves that (a) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (b) the instrument or accompanying communication was not received by that designated person, office, or place.
- (2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted.
- (d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

* * *

COLUMBIA COMMERCIAL CODE COMMENTS - §1-207 and §3-311

The amendment to §1-207 and a new section, §3-311, are part of revisions of the Columbia Commercial Code. The enactment of amended §1-207 clarifies that §1-207 of the Columbia Commercial Code does not apply to accord and satisfaction agreements reached by full payment or full satisfaction checks. New §3-311 establishes rules for accord and satisfaction by full payment or full satisfaction checks.

An accord and satisfaction agreement is a contractual method of discharging a debt. The "accord" is the agreement between the parties, while the "satisfaction" is the execution of the agreement. In some situations a person against whom a claim may be asserted attempts an accord and satisfaction of the disputed claim by tendering a check to the claimant for some amount less than the full amount

claimed by the claimant, with the check identified as "payment in full." Occasionally in such situations the recipient of the check will cash the check, but strike out or protest the full-payment language, and seek further amounts, arguing that the protest preserved the recipient's ability to seek further amounts.

Columbia case law had concluded that the "reservation of rights" language of §1-207 enables a creditor to endorse and cash a full-satisfaction check, protest the terms, and sue for remaining amounts the creditor believes are due. The purpose of this legislation is to clarify that §1-207 does not permit a creditor to do so. Accordingly, the sole amendment to §1-207 is the addition of subsection (2) stating that §1-207 "does not apply to an accord and satisfaction." Thus words of protest are not evidence that an accord and satisfaction did not take place. Subsection (1) has not been altered, and continues to provide machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute.

A new section, §3-311, was enacted to govern full satisfaction checks. It reiterates that a creditor is generally not permitted to endorse and cash a full-satisfaction check yet sue for more by protesting the terms. Under the new rule of §3-311, combined with amended §1-207, if a claimant endorses and deposits a check that is conspicuously identified as payment in full and is offered in good faith to settle a disputed debt, the claimant may not seek further amounts even if the claimant protests the full-settlement language before depositing the check. The section codifies two common law requirements concerning settlement payment: (1) the settlement payment must be offered as a good faith offer to settle a debt; and (2) the debt to be settled by the payment is either unliquidated or genuinely disputed, so there is consideration for the settlement promise by the creditor. The section also contains limited exceptions concerning inadvertent accord and satisfaction.

* * *

Mathers v. Vincent

Columbia Court of Appeal (2002)

Jeff Mathers (Mathers) appeals from a trial court decision granting summary judgment to Sandra Vincent (Vincent) in a lawsuit concerning the amount due on a driveway repaving job. The trial court held that because the parties had settled their dispute with an enforceable accord and satisfaction agreement, Mathers's lawsuit must be dismissed on summary judgment. We affirm.

The relevant facts are simple and not in dispute. Mathers paved Vincent's driveway. No specific price was identified in advance. After the driveway was completed, Mathers sent Vincent a bill for \$17,329.25. After a dispute arose concerning the amount due, Vincent sent Mathers a check for \$5,733.20 with the notation "Payment in full — 1150 Powell Taylor Driveway" written both on the memo line on the front of the check and above the endorsement line on the back of the check. After receiving the check Mathers struck through both notations, wrote "Under Protest" below his endorsement, and cashed the check. Mathers subsequently initiated the suit below for the balance due.

Vincent filed a motion for summary judgment contending that the disputed debt between herself and Mathers had been settled by accord and satisfaction as a result of Mathers's acceptance and negotiation of the check, notwithstanding Mathers's obliteration of the "payment in full" notation and his "under protest" endorsement of the instrument. The trial court executed an order granting Vincent summary judgment and dismissed Mathers's suit for the balance due.

Mathers contends that the trial court erred in granting summary judgment on the basis that §1-207 of the Columbia Commercial Code (CCC) and *Ditch Witch Trenching Co.* (1995) authorized Mathers to reserve his rights to pursue the disputed debt by striking through the "paid in full" language and writing "under protest" on the check. We disagree. While *Ditch Witch*, factually on all fours with

this case, held that endorsements with protests defeated accord and satisfaction, subsequent to that decision, the Columbia Legislature overruled the controversial "have-your-cake-and-eat-it-too result" of *Ditch Witch* when it amended the Columbia version of the Uniform Commercial Code in 2000. Consequently, §3-311, and not §1-207, dictates whether Mathers settled his dispute with Vincent when he endorsed and negotiated the check.

Subparagraph (a) of §3-311 contains three requirements for the application of §3-311 to a full satisfaction check. The three requirements state aspects of longstanding common law rules of accord and satisfaction.

First, pursuant to §3-311(a)(i) the check must be a genuine offer in good faith to settle a dispute. Thus it must be viewed as an offer: an objective manifestation of intent to be held to a settlement, viewed from the perspective of the offeree. "Good faith" in subsection (a)(i) means honesty in fact and observance of reasonable commercial standards of fair dealing. The meaning of "fair dealing" will depend upon the facts in the particular case. For example, if a check issuer was taking unfair advantage of the claimant, an accord and satisfaction would not result from payment of the check because of the absence of good faith by issuer. An example of lack of good faith is found in the practice of some business debtors in routinely printing full satisfaction language on their check stocks so that all or a large part of the debts of the debtor are paid by checks bearing the full satisfaction language, whether or not there is any dispute with the creditor. Under such practice the claimant cannot be sure whether a tender in full satisfaction is or is not being made. The requirement of good faith applies to the accord and satisfaction proposal only, however. A debtor can in good faith attempt to settle a dispute with a full payment check even though the debtor's bad faith behavior led to the claim that is disputed. In other words, even if the debtor is in bad faith regarding the underlying agreement, if the dispute in fact exists and the debtor tenders a settlement of the dispute in a genuine effort to settle it, then the tender will be deemed to be in good faith.

Second, §3-311 does not apply to cases in which the debt is a liquidated amount and is not subject to a bona fide dispute. In this regard Subsection (a)(ii) incorporates into statute the common law rule that accord and satisfaction agreements require consideration. If the debtor gives up an opportunity to assert that there is a bona fide dispute concerning either the proper amount (i.e. the liquidation issue) or whether the amount is owed at all (i.e. the dispute as to whether it is owed issue), that forbearance is consideration for the creditor's promise to settle.

A claim is liquidated if, at the time it arose, it is a readily ascertainable sum certain, that is, the evidence furnishes data that, if believed, makes it possible to compute the amount with exactness without reliance upon opinion or discretion. A bona fide dispute means an honest belief by the debtor that there is a dispute concerning the proper amount of whether the amount is owed. It is not necessary that the debtor's position in the dispute be correct or well-founded. If the claim is liquidated and the debtor does not have an honest belief in the viability of his or her position, then there is no consideration for the creditor's promise not to sue.

Third, the claimant must have received payment from the check. See § 3-311 (a)(iii).

If any one of the three requirements of §3-311(a) is not met, the remainder of §3-311 does not apply, and the claim has not been discharged, as there has been no valid accord and satisfaction agreement resolving the dispute. The burden of proof is on the person seeking enforcement of the accord and satisfaction to prove that the subsection (a) requirements of good faith, unliquidated or bona fide disputed debt, and payment received are met. If that person also proves that, as required by subsection (b), there was a conspicuous statement that the check was offered as payment in full, the claim is discharged unless subsection (c) applies. Normally the statement required by subsection (b) is written on the

check. Thus, the canceled check can be used to prove the statement as well as the fact that the claimant obtained payment of the check. Subsection (b) requires a "conspicuous" statement that the instrument was tendered in full satisfaction of the claim. The statement is conspicuous if it is so written that a reasonable person against whom it is to operate ought to have noticed it. If the claimant can reasonably be expected to examine the check, almost any statement on the check should be noticed and is therefore conspicuous. In cases in which the claimant is an individual the claimant will receive the check and will normally endorse it. Since the statement concerning tender in full satisfaction normally will appear above the space provided for the claimant's endorsement of the check, the claimant "ought to have noticed" the statement.

Subsection (c) of §3-311contains two exceptions that allow a claimant to avoid an inadvertent accord and satisfaction. Payment of the check might be obtained without notice to the personnel of the claimant concerned with the disputed claim. Subsection (c)(1) allows an organization claimant with very large numbers of customers to protect itself by advising customers by a conspicuous statement that communications regarding disputed debts must be sent to a particular person, office, or place. If the claimant proves that the check was not received at the designated destination the claim is not discharged unless subsection (d) applies. In addition, any claimant, organization or otherwise, may prevent an inadvertent accord and satisfaction by complying with subsection (c)(2). If the claimant discovers that it has obtained payment of a full satisfaction check, it may prevent an accord and satisfaction if, within 90 days of the payment of the check, the claimant tenders repayment of the amount of the check to the person against whom the claim is asserted.

Subsection (d), however, indicates that the exceptions contained in Subsection (c) do not apply if the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation cashed the check with actual knowledge that it was offered in full satisfaction. Thus if the claimant or her

agent is aware that the check was offered in full settlement, the claim is discharged even if the check was not sent to the person, office, or place required by a notice complying with subsection (c)(1) or the claimant tendered repayment of the amount of the check in compliance with subsection (c)(2). A claimant has actual knowledge that a check was tendered in full satisfaction of a claim only when that fact is brought to the attention of an individual having direct responsibility with respect to the dispute. Subsection (d) does not apply to every agent or employee of the claimant, but only to agents having direct responsibility with respect to the disputed obligation.

Application of §3-311 to the check sent by Vincent to Mathers indicates that the claim against Vincent is discharged. There are no disputed facts concerning whether the three prongs of §3-311(a) are met. The check was offered in good faith to settle the dispute. There are no facts suggesting that Vincent was trying to take advantage of Mathers or routinely puts payment in full language on every check. There was a bona fide dispute concerning how much was owed for the job, and since there had been no specific amount identified in advance, the debt was unliquidated. Vincent received payment when he negotiated the check. The notation "Payment in full —1150 Powell Taylor Driveway" on the front and the back of the check was a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. Because Mathers crossed out the restrictive language, presumably believing he could thereby negate the language, there can be no argument that he was unaware the check was tendered in full satisfaction of the claim. And in any event, Mathers did not, after cashing the check, tender repayment within ninety days.

Since there are no genuine issues of material fact and Vincent is entitled to judgment as a matter of law, the trial court properly granted summary judgment.